IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9947 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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TOPPAN PLYWOOD PRIVATE LTD. & 1 - Petitioner(s)
Versus
UNION OF INDIA & 3 - Respondent(s)

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Appearance :
MR DV PARIKH for Petitioner(s) : 1,None for Petitioner(s) : None for Petitioner No(s).: for Petitioner(s) : 2,
MR JITENDRA MALKAN for Respondent(s) : 1 - 4.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 27/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 Considering that the matter pertains to 1998 and the view that the Court is inclined to take, the petition is taken up for final hearing and disposal today.

2 Rule. Mr.Malkan waives service of Rule.

3 Heard Mr.D.V.Parikh, learned Advocate for the petitioner and Mr.Malkan appearing on behalf of the respondents.

4 On 25/4/1996 an Order-In-Original came to be made by the Assistant Commissioner of Central Excise which was challenged by the petitioner by way of an appeal before Commissioner (Appeals), Ahmedabad. The appeal was accompanied by an application seeking stay of demand. On 3/6/1997 the Commissioner (Appeals) issued communication

which reads as under :

> *“ Sirs,*
>
> *In connection with your petition for stay/waiver of pre-deposit of duties dated 22-7-1996 sent along with your appeal memorandum, you are informed that the matter has been prima facie considered, but your request is not found acceptable under the existing facts represented in your appeal petition/stay petition. In case you have additional evidence to support your claim for financial hardship, you are hereby given an opportunity to present the same before this authority, either through a written reply and annexed documents, or by personal appearance before the Commissioner (Appeals), Central Excise & Customs, Ahmedabad in support of your claim on this aspect. You will be heard on any date from 16th to 27th June,1997 (except Saturday and Sunday) for appreciation of any additional evidence so presented.*
>
> *2 In case you do not avail of this opportunity, your petition for stay shall stand decided against you. In addition, you shall be required to make the pre-deposit of duties adjudged in the impugned order within the said period of 15 days, failing which your appeal petition on merits shall be dismissed for non-compliance of the requirement of Section 35F of the Central Excise Act,1944.*

After making the deposits, a photocopy of payment document should be sent so as to reach this office by 4th July,1997 which shall be the last date for ensuring compliance of the mandatory requirement of the section of the Act. Failure on your part in this regard shall forthwith result in dismissal of the appeal petition for non compliance of the requirement of pre-deposit of duties required under the law.

3. Appellants making additional representation in argument of financial hardship should also note that no extension of time for representation shall be accorded and your appeal petition/ stay petition dealt with accordingly in requirement of the provisions of the law.

4 Kindly take immediate notice and ensure compliance with the stipulated period."

5 It is an admitted fact that the petitioner did not respond to the aforesaid communication dated 3/6/1997. Therefore, vide order dated 15/12/1997 the appeal came to be dismissed. It is also necessary to note that common appellate order was made in case of 17 different assessees including the petitioner whose name appears at

Sr.No.11 of the consolidated order.

6 On behalf of respondent No.4 an affidavit-in-reply is tendered and in paragraph No.8 of the affidavit-in-reply it is stated thus :

> *"8. That being aggrieved and dissatisfied by the order passed by the Asst. Commissioner dated 25.04.1996, petitioner preferred an appeal before the Commissioner, Appeals along with stay application. The Commissioner Appeals, vide notice dated 03.06.1997 issued notice to the petitioner informing that considering stay application and waiver of deposit of dues, the request is not found acceptable and directed the petitioner to produced additional evidence to support its claim for financial hardship in view of provisions of Section 35F of Central Excise Act and an opportunity was given to present the case before the Commissioner of appeals. Thus the petitioner was directed to produce the evidence if any and/or an opportunity was given to be heard on any date from 16 to 27.06.1997. It was also sought in the said*

notice that in case the petitioner did not avail of the opportunity, the petitioner for stay shall stand decided against him".

7 On behalf of the respondent authority Mr.Malkan submitted that it is true that the communication dated 3/6/1997 (Annexure-E) cannot be termed to be a notice of hearing and in fact Commissioner (Appeals) had made up his mind without issuing any opportunity of hearing to the petitioner. That the impugned communication dated 3/6/1997 merely called for additional evidence in support of the stay application while rejecting the stay application. However, he hastened to add that as the matter pertains to a point of time which is more than a decade old and the controversy on merits stands concluded by the decision of the Apex Court against the petitioner it would not be necessary to restore the matter to Commissioner (Appeals).

8 Responding to the aforesaid last submission made by Mr.Malkan, Mr.Parikh contended that there were, issues regarding limitation, jurisdiction etc. and need to be dealt with and hence, if the appeal is restored to the file of the Commissioner (Appeals) it would not result in futile exercise.

9. As can be seen from paragraph No.8 of the affidavit-in-reply and the submissions made by learned Counsel for the respondent it is apparent that the Commissioner (Appeals) virtually decided the stay application without granting any hearing to the petitioner. Communication dated 3/6/1997 is an advance order, if one can term it to be so, only calling upon the petitioner to furnish additional evidence in support of the plea of financial hardship. The position in law is well settled that an authority who is called upon to hear an application for

stay is required to consider not only the financial hardship aspect of the matter, but in the first instance has to take into consideration whether the applicant has a prima facie case in the appeal, and thereafter take into consideration the aspect of financial hardship, followed by a finding on balance of convenience. In the present case Commissioner (Appeals) has singularly failed to carry out the said exercise and that too without granting any opportunity of hearing to the petitioner.

10.There is one more aspect of the matter. As can be seen from the concluding portion of paragraph No.1 of aforesaid communication dated 3/6/1997, the petitioner has been called upon to tender additional evidence and remain present for hearing on any day between 16th to 27th June,1997 for appreciation of any additional evidence so presented. Thus, even if the latter

portion of the communication could be termed to be notice of hearing, at least qua additional evidence, the same also suffers from want of application of mind as well as vagueness and cannot be sustained. How can a person know when the person will be granted hearing i.e. on which day between 16th to 27th June,1997.

11. Upon the failure of the petitioner to avail of the so called opportunity it appears that Commissioner (Appeals) made an order dated 16/9/1997 directing the petitioner and similarly other situated assessees to pre-deposit the amount of duty/penalty, as the case may be, and produce the proof of compliance by 23/9/1997. This fact appears in paragraph No.2 of order dated 15/12/1997 made by Commissioner (Appeals) while dismissing the appeal of the petitioner.

12. The petitioner has challenged the Order-in-

Original as well as the appellate order, but has not challenged the order dated 16/9/1997 made on stay application. However, in so far as Order-in-Original is concerned, the petitioner having already availed of the remedy of appeal relief qua the same cannot be granted in these proceedings. In so far as the order dismissing the appeal and order directing pre-deposit are concerned, it is apparent that both these orders are based on the so called communication dated 3/6/1997. As the said communication itself is found to be bad in law, both the subsequent orders made by the appellate authority cannot be permitted to hold the field, as they are passed pursuant to communication dated 3/6/1997.

13.In the circumstances, communication dated 3/6/1997, order dated 16/9/1997 and order dated 15/12/1997 are hereby quashed and set aside. The petitioner is relegated to the point of time

when his stay application was pending before Commissioner (Appeals). The Commissioner (Appeals) is directed to grant proper and reasonable opportunity of hearing to the petitioner on the stay application and then decide the same in accordance with law. For this purpose the petitioner shall remain present before the Commissioner (Appeals) along with copy of this order on 13/02/2006 and thereafter Commissioner (Appeals) shall fix the application for hearing subject to mutual convenience of both the sides.

14. The petition is allowed accordingly. Rule made absolute to the aforesaid extent. There shall be no order as to costs.

Sd/- Sd/-
(D.A.MEHTA,J) (H.N.DEVANI,J)

m.m.bhatt